IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DR. RALPH S. BEREN, ED.D.,

Plaintiff,

v.

BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY, et al.,

Defendants

_____/

No. C-06-4706 MMC

ORDER GRANTING ELK GROVE DEFENDANTS' MOTION TO DISMISS; GRANTING IN PART AND DENYING IN PART CSU DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT; VACATING HEARING

Before the Court are two motions: (1) the motion to dismiss plaintiff Ralph S. Beren's Third Amended Complaint ("TAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, filed July 16, 2007, by defendants Elk Grove Unified School District ("EGUSD") and Elizabeth Kaneko ("Kaneko") (collectively, "Elk Grove Defendants"); and (2) the motion to dismiss the TAC pursuant to Rules 12(b)(1) and 12(b)(6), or, in the alternative, for summary judgment pursuant to Rule 56, filed July 16, 2007, by defendants Board of Trustees of California State University ("Trustees"), California State University ("CSU") and Nathan Avani ("Avani") (collectively, "CSU Defendants"). Plaintiff has filed a single opposition to both motions, to which the Elk Grove Defendants and CSU Defendants have separately replied. Having considered the parties' submissions filed in support of and in opposition to the motions, the Court deems the matter suitable for decision on the papers,

VACATES the hearing scheduled for August 24, 2007, and rules as follows:

1. First Cause of Action (42 U.S.C. § 1983)

a. For the reasons stated by defendants, the First Cause of Action is subject to dismissal to the extent it is based on a claim that plaintiff was deprived of his First Amendment rights. Specifically, the speech in question, plaintiff's having requested a hearing to review negative evaluations made by students and/or Kaneko, is not speech protected by the First Amendment. See McKinley v. City of Eloy, 705 F. 2d 1110, 1115 (9th Cir. 1983) (holding "speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual grievances").

b. For the reasons stated by defendants, the First Cause of Action is subject to dismissal to the extent it is based on a claim that plaintiff was deprived of equal protection. Specifically, plaintiff cannot proceed under the theory he was discriminated against on account of his disability. See Engquist v. Oregon Dep't of Agriculture, 478 F. 3d 985, 993-996 (9th Cir. 2007) (holding "class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees"); Lauth v. McCollum, 424 F. 3d 634 (7th Cir. 2005) (holding "class-of-one" equal protection plaintiff is one "who does not belong to any 'suspect' (that is, favored) class"); Doe v. Chandler, 83 F. 3d 1150, 1155 (9th Cir. 1996) ("For the purposes of equal protection analysis, the disabled do not constitute a suspect class."); Sharer v. Oregon, 481 F. Supp. 2d 1156, 1162-63 (D. Ore. 2007) (holding, in light of Engquist, plaintiff could not proceed with equal protection claim based on theory plaintiff was terminated by state on account of discrimination based on disability).

c. For the reasons stated by defendants, the First Cause of Action is subject to dismissal to the extent it is based on a claim that plaintiff was deprived of substantive due process. Specifically, plaintiff has failed to allege any facts in support of such theory. (See Order, filed June 11, 2007, at 2:6-14, 4:16 (holding conclusory allegations insufficient; affording plaintiff leave to amend).) Moreover, nothing in the TAC suggests defendants engaged in the type of "extreme" conduct required to support such a claim. See Engquist,

478 F. 3d at 997 (holding claim plaintiff was deprived of substantive right to employment requires allegation government employer engaged in "extreme" conduct, such as putting plaintiff on "government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes the blacklisted person from his occupation").

d. For the reasons stated by defendants, the First Cause of Action is subject to dismissal to the extent it is based on a claim that plaintiff was deprived of procedural due process. Specifically, although plaintiff adequately alleges Avani did not provide plaintiff with a hearing before demoting and terminating plaintiff, plaintiff fails to plead facts to support his asserted conclusion that he has a property interest in continued government employment. (See Order, filed June 11, 2007, at 2:6-14, 4:16 (holding conclusory allegations insufficient; affording plaintiff leave to amend).)

2. Second Cause of Action (42 U.S.C. § 1985)

For the reasons stated by defendants, plaintiff has failed to state a claim of conspiracy to violate his constitutional rights under § 1985; specifically, plaintiff has not adequately alleged a violation of § 1983.

3. Third Cause of Action (29 U.S.C. § 794)[1]

a. For the reasons stated by Elk Grove Defendants, plaintiff has failed to state a claim against EGUSD under § 794. Specifically, plaintiff has failed to allege that EGUSD was his employer, let alone to allege any facts to support any such assertion. (See Order, filed June 11, 2007, at 3:16-19; 4:17-18 (noting said deficiency in pleading; affording plaintiff leave to amend).)

b. For the reasons stated by plaintiff, the Third Cause of Action is not subject to dismissal as against CSU. Although the TAC is not a model of clarity, the Court finds plaintiff has sufficiently alleged he suffers from "anxiety and depression" that substantially limit specified major activities, and that he was demoted and constructively terminated by

[1]Although the TAC states the Third Cause of Action is brought against "all defendants," (see TAC at 22:6), plaintiff states in his opposition that "all defendants" is a typographical error, and that he is not alleging such claim against Kaneko or Avani, (see Pl.'s Opp., filed August 3, 2007, at 7:16-18).

CSU because of such disability. (See TAC ¶¶ 4, 43.)[2]

CONCLUSION

For the reasons stated above:

1. Elk Grove Defendants' motion to dismiss is hereby GRANTED, and plaintiff's claims against Elk Grove Defendants are hereby DISMISSED without further leave to amend; and

2. CSU Defendants' motion to dismiss or, alternatively, for summary judgment is hereby GRANTED in part and DENIED in part, as follows.

a. The First and Second Causes of Action are hereby DISMISSED without further leave to amend.

b. In all other respects, the motion is DENIED.

IT IS SO ORDERED.

Dated: August 21, 2007

MAXINE M. CHESNEY
United States District Judge

[2]As CSU Defendants correctly note, plaintiff is required to prove his impairments are substantially limiting, see Toyota Motors Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding plaintiff must "prove a disability" by "offering evidence" to show extent of limitation caused by impairment is "substantial"); plaintiff, however, is not required to identify evidence in his pleadings. CSU Defendants also observe that plaintiff did not make a disability discrimination claim until well after the termination of his employment; said observation, however, does not provide a basis to dismiss the claim at the pleading stage. Finally, although plaintiff, in one sentence of ¶ 4 of the TAC, refers to his disability as "limit[ing]," rather than as "substantially limit[ing]," the Court does not find dismissal for the sole purpose of affording plaintiff leave to amend to add the word "substantially" to the subject sentence is required, particularly given plaintiff's earlier use in the same paragraph of the phrase "substantially limit."